Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-748**

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,

*Petitioners,*

—v.—

MOBILE STEAMSHIP ASSOCIATION, INC.,

—and—

ROBERT E. MALONE,

*Respondents.*

ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

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ON CERTIORARI TO THE SUPREME COURT OF ALABAMA

## BRIEF OF THE REPUBLIC OF LIBERIA AS *AMICUS CURIAE*

### Statement of Interest

The interests of the Republic of Liberia in this case are limited, but nonetheless important. Petitioners would blockade Liberian vessels from American ports—at least until Petitioners were assured freedom from economic competition by Liberian (and other) vessels not subject to their hegemony. But Liberian vessels are entitled to compete for the carriage of goods to and from the United States

and this freedom of competition, reciprocal with the same freedom to United States vessels trading to Liberia, is guaranteed by a long-standing mutual treaty between the two nations. It is the position of the Republic of Liberia that Petitioners' actions, and those of their individual members, constitute a transgression of treaty rights which is not sanctioned or protected by the Constitution of the United States but, on the contrary, is in violation of the law of this land.

Accordingly, the Republic of Liberia requests the permission of the Court to appear herein and to submit the following brief in the capacity of *amicus curiae*. Both Petitioners and Respondents have consented to the filing of this brief.

The Republic of Liberia respectfully urges this Honorable Court to affirm the judgment of the court below.

## Opinions Below

The opinions and orders of the courts below appear at pp. 5a-30a of the Appendix to the Petition for Certiorari herein.[1]

## Question Presented

Whether the calculated actions of Petitioners, claimed by them to be "informational" only but so carried out as to abridge rights guaranteed by international treaty, are sanctioned or protected by the freedom of speech clause of the First Amendment to the Constitution of the United States.

[1] All such "a" page references following are to the Appendix to the Petition.



## Treaty Provisions Involved

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND LIBERIA. SIGNED AT MONROVIA, AUGUST 8, 1938. (54 STAT. 1739.)

### ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted . . . to engage in . . . commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; . . . and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it . . . .

. . . . . .

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

. . . . . .

### ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

ARTICLE XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

ARTICLE XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

ARTICLE XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the



same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

## Statement of the Case

The Republic of Liberia adopts the statement of the case appearing in the Brief of Respondents.

## Summary of Argument

The United States and Liberia have reciprocal Treaty obligations to ensure freedom of commerce and navigation each to the other's vessels and cargoes. Petitioners and their members, as individual citizens of the United States, are bound to honor the Treaty obligations and to take or cause to be taken no action for the purpose of impairing rights guaranteed by the Treaty. The action of Petitioners in the case at bar is deliberately calculated to impair Treaty rights, and constitutes as well a wrongful interference with the rights of Respondents. Petitioners' conduct is therefore unlawful and is not sanctioned or protected by the First Amendment. The judgment of the court below is correct and should be affirmed.

# ARGUMENT

## I.

## Introduction

Alcon Ltd., owner of the S/S AQUA GLORY (Official Number 2768), is a Liberian corporate national;* as such, it is entitled to the rights and protections guaranteed by the United States under treaty obligation—even as, in the past, the same rights and protections have been extended by Liberia to corporate nationals of the United States.

The treaty here drawn into principal consideration is the Treaty of Friendship, Commerce and Navigation (hereafter "FCN") between the United States and Liberia signed at Monrovia on August 8, 1938. The Treaty is completely reciprocal in its terms, and was drawn to accommodate subsequent changes in maritime circumstance, though at that time the maritime power of Liberia was very small, and that of the United States very great. Liberia, then as now, was a country rich in natural resources which were beginning to be exported in quantity; the only means of such commerce being the sea, the potential benefit to American Flag shipping was obvious.

The effect of this Treaty was to open up the commerce of Liberia to the United States on a most-favored nation basis. But beyond "most-favored-nation" clauses, certain explicit rights in respect of navigation and merchant shipping were granted by each Party to the other; those most relevant to this case are contained in Articles VII, XIV, XV, and XVI, which are set out *supra* pp. 3-5.

* Indeed, the vessel is guaranteed her rights by the Treaty irrespective of her ownership; see Article XV and also Articles XIV and XVI of the FCN Treaty, *supra* pp. 4-5.



The issue in this case is of absolutely crucial international importance. A treaty right ignored is a treaty right abrogated; and a treaty obligation ignored becomes no obligation at all. Nowhere are such treaty questions more important than here, where the national security and international commerce of the contracting Parties are directly and obviously affected by the outcome.

A substantial percentage of imports to, and exports from, the United States of America are carried by Liberian vessels, pursuant to the FCN Treaty. If vessels of the Republic of Liberia may actually be blockaded by Petitioners from ports of the United States of America, the result must be that both the economies of Liberia and the United States will suffer.

But the vital questions of law, both domestic and international, overshadow even the considerable economic impact. For the Treaty here in question between the United States and Liberia undertakes that:

> ". . . there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties . . . shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation."[1]

and that

> "Merchant vessels . . . under the flag of either of the High Contracting Parties *shall be permitted to discharge* portions of cargoes at any port open to for-

[1] Article VII.

eign commerce in the territories of the other High Contracting Party . . . and they *shall be permitted to load* in like manner at different ports in the same voyage outward . . . ."[2]

A classic exposition of the nature of treaties and their status as the supreme law of the land under the Constitution[3] is that of John Jay in *The Federalist,* No. LXIV:

> "Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as

[2] Article XVI. Italics supplied.

[3] Constitution of the United States of America, Article VI, cl. 2.



> they will be at any future period or under any form of government."

Put another way, the sanctity of a treaty rests upon a pledge made before the world by the States party to it that it is a solemn contract, made for consideration, which each commits itself to uphold and which each may hold the other to.

## II.

**The individual and collective actions of Petitioners and their members violate the FCN Treaty.**

It is, of course, one of the "facts of life" in the maritime commercial world of today that American seamen enjoy, by far, the highest wage scale in the industry. In that sense, alone, the wages of the crews of every non-American merchant ship in the world are "substandard." Petitioners have created a situation in which their wage scale is far from standard and is inflated to a non-competitive level. They would therefore blockade the navigation and maritime commerce of Liberian vessels having competitive wage scales—by actions which are intended and designed to curb the free and effective access of ships of a friendly foreign government to United States ports, working a severe disruption if not a cessation of this foreign commerce; for as stated by this Court in *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 417 (1865):

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals."

It is also a fact that the actions and objectives of Petitioners (including here, as elsewhere in this brief, their

individual members) in this case are discriminatorily directed at merchant vessels and cargoes of the Republic of Liberia, both as compared to those of the most favored of other foreign nations and to American Flag vessels and cargoes themselves (6a-8a).

A similar ability to disregard treaties guaranteeing freedom of commerce and navigation was once asserted on behalf of certain patentholders; but as this Court said, in *Brown* v. *Duchesne,* 60 U.S. (19 How.) 183 (1856), at 197-198:

> "The construction claimed by the plaintiff would confer on patentees not only rights of property, but also political power, and enable them to embarrass the treaty-making power in its negotiations with foreign nations. . . . And if a treaty should be negotiated with a foreign nation, by which the vessels of each party were to be freely admitted into the ports of the other, upon equal terms with its own, upon the payment of the ordinary port charges, and the foreign Government faithfully carried it into execution, yet the Government of the United States would find itself unable to fulfil its obligations if the foreign ship had about her, in her construction or equipment, anything for which a patent had been granted. And after paying the port and other charges to which she was subject by the treaty, the master would be met with a further demand, the amount of which was not even regulated by law, but depended upon the will of a private individual."
>
> ". . . [T]he Government would be unable to carry into effect its treaty stipulations without the consent of the patentee. . . . The same difficulty would exist in executing a law of Congress in relation to foreign ships and vessels trading to this country. And it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power. . . ."



The deliberate disruption by Petitioners of the navigation and commerce of Liberian vessels is, *ipso facto,* in violation of the FCN Treaty.

The most authoritative general pronouncement on the binding effect of treaty provisions on private citizens was made by Chief Justice Taney in *Kennett* v. *Chambers,* 55 U.S. (14 How.) 38 (1852), at 49-50:

> "The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the

scope of this delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made."

Moreover, the duty and obligation of individual citizens of the United States to abide by the letter and spirit of the FCN Treaty with Liberia was declared in the Proclamation of President Roosevelt dated November 13, 1939, publishing the terms of the Treaty. 54 Stat. 1750 (1941).

> "Now, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and *every article and clause thereof may be observed and fulfilled with good faith by* the United States of America and *the citizens thereof.*" (Italics supplied.)

In considering the force and effect of this Proclamation it must be borne in mind that in the area of treaty construction, the interpretations made by the executive are entitled to great weight before the courts. *Sullivan* v. *Kidd,* 254 U.S. 433, 442 (1921).

This FCN Treaty, unmodified by the Parties and unaltered in its effect, stands as the supreme law of the land. The actions of Petitioners are in direct violation of this Treaty and of that law.



## III.

**The actions of Petitioners and their individual members in the instant case are neither sanctioned nor protected by the First Amendment.**

As Petitioners' brief seems at pains to point out (pp. 4-7), the picketing campaign was planned in detail, with extreme care, at the highest national level of Petitioners' organizations. Petitioners' "Committee of American Maritime Unions" even prepared and distributed from a central location a kit of carefully worded picket signs, pamphlets and instructions to local union representatives. The printed instructions (Petitioners' brief, pp. 6-7) refer to "publicity picketing"—yet one is struck by certain of the particular instructions, *e.g.,* number 3: "Pickets must be clearly instructed that under no circumstances should they speak to anyone, and in answer to all questions, they are merely to hand the person a leaflet." Or number 4: "If anyone asks . . . whether they should cross the picket line, no answer should be given, but instead the person should be handed a leaflet." Or number 5: "In response to any inquiries . . . refer them solely to the language on the picket sign and give him a copy of the leaflet. Do No More."

Plainly, there was something about this "publicity picketing" concerning which Petitioners wanted no publicity at all—even to the ironical degree that free speech by the pickets themselves had to be restrained. From later evidence it is both logical and fair to conclude that what Petitioners feared to publicize was a most hoped-for effect of their campaign, the blockading of the vessels named on the picket signs. In order to achieve this, Petitioners were willing to bring the business of entire ports to a stop and to

interdict the flow of interstate and international commerce (20a-21a, 24a).

This conduct constituted a treaty violation by Petitioners as to the AQUA GLORY and her owner and was thus unlawful, but it was also a wrongful interference with the rights of Respondents to carry on their businesses. When Petitioners' covert purpose was revealed to the trial court it issued a preliminary injunction in conformity with the law of Alabama, which order has been sustained by the highest court of that State.

Petitioners now bring to this Court the argument, reduced to its essentials, that so long as the picketing was informational and peaceful it was protected by the First Amendment to the Constitution, as made applicable by the Fourteenth Amendment. But the matter is not that simple where, as here, there was not merely an informational but also a disguised purpose, which had as its objective an unlawful and a wrongful interference with the rights of others. Numerous cases carried to this Court have made it clear that the First Amendment is not a license to abridge the rights of others; see, *e.g., Baines* v. *City of Danville, Va.*, 337 F.2d 579 (4 Cir. 1964), *cert. denied*, 381 U.S. 939. It has been made equally clear that not all conduct claimed to have a communicative purpose is protected by the First Amendment; see, *e.g., Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969), *aff'd*, 396 U.S. 277. Surely, where "publicity picketing" is carried out not only for the purpose of information but also to achieve unlawful and wrongful objectives, it may safely be enjoined without infringement upon the free speech guarantee of the First Amendment[1]—particularly where, as here, it would have been an easy matter for Petitioners to arrange purely informational picketing which

[1] See *Twin Falls Construction Co.* v. *Operating Engineers Local No. 370*, 95 Idaho 370, 509 P.2d 788 (Sup. Ct. 1973). On the question of pubic policy, see *Bridges* v. *Davis*, 443 F.2d 970 (9 Cir. 1971), *reh. denied* 445 F.2d 1401, *cert. denied* 405 U.S. 919.



did not actuate, or incite others to give effect to, their contrived blockade.

Petitioners cannot hold the First Amendment of the American Constitution before them as a screen for otherwise unlawful and wrongful conduct.

## CONCLUSION

**The judgment below should be affirmed.**

Dated: August 8, 1974

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on this 8th day of August, 1974, three copies of the within Brief *amicus curiae* were mailed, postage prepaid, to Counsel for the parties listed below. I further certify that all parties required to be served have been served.

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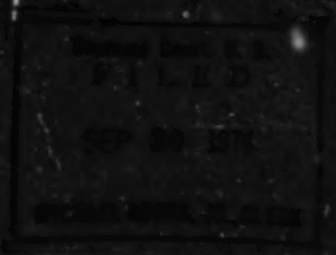

No. 73-749

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v.

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MAGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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*v.*

MOBILE STEAMSHIP ASSOCIATION, INC., AND ROBERT E. MALONE

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

### INTEREST OF THE UNITED STATES

This memorandum addresses the threshold issue of preemption in the case. We submit it because of the importance of that question to the government, including the National Labor Relations Board and the Department of State, which subscribe to the views expressed here.

As in *Windward Shipping (London) Ltd., et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104, the decision in the present case could have

important consequences for United States trade and could create serious problems in United States foreign relations. Picketing that prevents the loading or unloading of foreign-flag ships in United States ports could be severely disruptive of the United States economy, since foreign-flag ships carry close to 95 percent by tonnage (and 81 percent by value) of all United States waterborne trade, including 95 percent of waterborne deliveries of petroleum products.

## STATEMENT

Except in one important respect—the character of the complaining party—this case is identical to *Windward Shipping, supra.*

The vessel *Aqua Glory* is a ship of Liberian registry which carries cargo between United States and foreign ports. The crew and officers of the vessel are foreign nationals (Pet. App. 8a). On November 3, 1971, while the *Aqua Glory* was docked at the Port of Mobile, Alabama, for the purpose of loading and unloading cargo, six American maritime unions, acting in concert, established a picket line in front of the vessel. Four pickets carried signs which read (Pet. App. 6a):

> ATTENTION TO THE PUBLIC, THE WAGES AND BENEFITS PAID ABOARD THE VESSEL SS AQUA GLORY * * * ARE SUBSTANDARD TO THOSE OF AMERICAN SEAMEN. THIS RESULTS IN EXTREME DAMAGE TO OUR WAGE STANDARD AND THE LOSS OF OUR JOBS.



> PLEASE DO NOT PATRONIZE THESE VESSELS. HELP THE AMERICAN SEAMEN. WE HAVE NO DISPUTE WITH ANY OTHER VESSELS AT THIS SITE.
>
> [Printed names of the six unions]

The pickets did not speak to anyone. Instead, they handed out literature which read (Pet. App. 7a):

> TO THE PUBLIC:
>
> American Seamen have lost approximately 50% of their jobs in the past few years to foreign flag ships employing seamen at a fraction of the wages of American Seamen.
>
> American dollars flowing to these foreign ship owners operating ships at wages and benefits substandard to American Seamen, are hurting our balance of payments in addition to hurting our economy by the loss of jobs.
>
> A strong American Merchant Marine is essential to our national defense. The fewer American flag ships there are, the weaker our position will be in a period of national emergency.
>
> PLEASE PATRONIZE AMERICAN FLAG VESSELS, SAVE OUR JOBS, HELP OUR ECONOMY AND SUPPORT OUR NATIONAL DEFENSE BY HELPING TO CREATE A STRONG AMERICAN MERCHANT MARINE.
>
> Our dispute here is limited to the vessel picket at this site, the SS * * *.

The names of the unions again appeared at the bottom of the leaflets.

No labor dispute existed between the owners of the *Aqua Glory* and their crew or the foreign unions

representing the crew while the picketing took place. The picketing was peaceful (Pet. App. 8a).

As a result of the picketing, longshoremen and other workers refused to service the vessel (Pet. App. 9a). This triggered the present suit, initiated by the Mobile Steamship Association, a non-profit corporation whose members include stevedoring companies and agents representing steamship companies. The Association asked an Alabama state court to enjoin the picketing on the grounds that the unions had unlawfully interfered with the contractual relationship between Association members and the companies operating the picketed vessels, and with the Association members' right to carry on their lawful business (Pet. App. 37a–39a). Shortly thereafter, respondent Malone intervened. He grows soybeans which are delivered to grain elevators at the docks and then loaded aboard vessels for export, and he claimed that the unions' activity similarly interfered with his right to carry on his lawful business (Pet. App. 6a).

The Alabama Circuit Court preliminarily enjoined the picketing (Pet. App. 28a–30a). The Alabama Supreme Court affirmed, 291 Ala. 201, 279, So. 2d 467, relying upon *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10; and *Incres Steamship Company* v. *Maritime Workers,* 372 U.S. 24. The appellate court stated that "[t]he dispute was either one between the unions and the foreign shipowners to force a raise in the internal standards of these vessels, or one where the intent was to block use of those ships to force Congress to act in the international sphere, which in either case



are matters affecting international relations and not properly for NLRB jurisdiction" (Pet. App. 14a). Accordingly, the conclusion was reached that the Alabama courts were not preempted from entertaining the suit by the Labor Management Relations Act of 1947, 29 U.S.C. 141, *et seq.*

## DISCUSSION

The obvious first question in the case is: Does *Windward Shipping* resolve the issue whether the state courts properly entertained jurisdiction of this suit? We submit that it does, subject to one qualification.

1. Both cases involve picketing of a foreign vessel by American unions, calling attention to the adverse consequence for domestic seamen of the lower wages paid foreign seamen, and asking all those in a position to do so to boycott the foreign vessel. In form, in purpose, and in effect, the picketing in this case was identical to that in *Windward Shipping.* Indeed, the same unions were involved and identical signs and literature were used. In both cases, the unions expressly disclaimed any dispute with the foreign vessel and eschewed any violence. Yet, here, as in *Windward Shipping,* the picketing effectively dissuaded longshoremen and other neutral employees from loading or unloading the ship.

On these facts, this Court in *Windward Shipping* reasoned:

> [T]he pickets must have hoped to exert sufficient pressure so that foreign vessels would

> be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. [415 U.S. at 114.]

Thus, if the picketing were successful, the consequential increase in operating costs for foreign vessels "would have more than a negligible impact on [their] 'maritime operations' "—an impact which "would be by no means limited to costs incurred while in American ports." (*Ibid.*) The Court concluded, therefore, that since the impact of the picketing was not "limited to the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate" (*ibid.*), the activity was not subject to regulation by the Labor Board and the state courts were free to intervene.

The same considerations would seem to be dispositive here. To be sure, in our case, those who sought the injunction were neutral American employers, not foreign shipowners as in *Windward Shipping*. But it is not apparent how the character of the state court plaintiff can bring within the ambit of the Labor Relations Act activity which has been held outside it. Accordingly, the proper conclusion would seem to be that, here too, the state courts have exclusive jurisdiction to enjoin the picketing.

2. There is, however, a difficulty in concluding the matter so swiftly. Section 8(b)(4)(B) of the National



Labor Relations Act[1] was enacted to shield innocent third persons from the adverse impact of labor disputes to which they were not privy,[2] and it is difficult to appreciate why the respondents here—American employers and suppliers—should not be free to invoke the Board's aid under that provision.

Thus, here, when longshoremen refused to cross the picket lines to load and unload the foreign vessels, their employers might have wished to seek relief from

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[1] The relevant portion of the provision, codified as 29 U.S.C. 158(b)(4)(B), is as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *."

[2] See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386–390; *National Woodwork Manufacturers* v. *National Labor Relations Board*, 386 U.S. 612, 624.

the Board. Since the picketing, to the extent that it had secondary effects, "arguably" amounted to a secondary boycott prohibited by Section 8(b)(4)(B),[3] the Board would plainly have jurisdiction to entertain the complaint if the primary dispute did not involve a foreign vessel. It is not apparent why the nationality of the primary employer should make any difference. The secondary pressures brought to bear upon the neutral parties are the same, regardless of the target's nationality. Moreover, since foreign-flag ships carry more than 90 percent of all United States waterborne foreign trade, the secondary aspects of a primary dispute with foreign-flag ships could be widespread, affecting any agricultural producer or manufacturer who depends upon foreign-flag vessels for carrying his goods. If the Labor Board were to lack jurisdiction over these secondary effects, neutral parties far removed from the primary dispute would thereby lose the protection of Section 8(b)(4)(B) of the Act.

On the other hand, the normal rule, where activity is "arguably" prohibited by the National Labor Relations Act, is that state courts are preempted. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. Thus, holding that the Labor Board has exclusive jurisdiction of secondary activity involving American antagonists regardless of the nationality of the primary employer would bring us back to the anomaly that the state courts may or may not enjoin picketing

[3] See *Moore Drydock*, 92 NLRB 547, 549; *Grain Elevator Workers, Local 418* v. *National Labor Relations Board*, 376 F. 2d 774 (C.A.D.C.), certiorari denied, 389 U.S. 932.



depending on the identity of the plaintiff. That result, as we have noted, seems untenable. Accordingly, we suggest a solution that accommodates both concerns.

3. A way to reconcile the competing claims of Section 8(b)(4)(B) and *Windward Shipping* is to recognize that state courts and the Labor Board have concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners. Under this arrangement, Section 8(b)(4)(B) protection would be available to neutral parties regardless of the nationality of the primary target, and the jurisdiction of state courts could be invoked regardless of the identity of the plaintiff.

When the primary dispute is not in "commerce" within the meaning of the Act, the Labor Board need not have exclusive jurisdiction over secondary aspects "arguably" subject to Section 8(b)(4)(B). "*Garmon* * * * does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations * * *." *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103. The preemption doctrine has never been rigidly applied when it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the Labor Board. Congress[4]

[4] See, *e.g.*, Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. 187, which expressly permits anyone injured by a violation of Section 8(b)(4) of the National Labor Relations Act to recover damages in a federal court even though such unfair labor practices are also remediable by the Board; Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, which permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an

and this Court[5] have carved out exceptions to the Board's exclusive jurisdiction. These exceptions "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca* v. *Sipes,* 386 U.S. 171, 180.

Here the application of state law would not operate to frustrate the purpose of the federal jurisdiction. A primary justification for the preemption doctrine—"the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose * * *," *Vaca* v. *Sipes, supra,* 386 U.S. at 180–181—is not applicable to cases where the primary dispute is outside the jurisdiction of the Board. "[E]ven if a § 8(b)(4)(B) violation were present, central

unfair labor practice within the jurisdiction of the Board (see *Smith* v. *Evening News Assn.*, 371 U.S. 195); and Section 14(c) of the National Labor Relations Act, as amended by Title VII, Section 701(a) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 164(c), which permits state agencies and courts to assume jurisdiction "over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

[5] See, *e.g.*, *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (libel); *Automobile Workers* v. *Russell*, 356 U.S. 634 (violence); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617 (wrongful expulsion from union membership); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (mass picketing); *Vaca* v. *Sipes*, 386 U.S. 171 (duty of fair representation).



interests served by the *Garmon* doctrine are not endangered by a state injunction when * * * the workers sought to be organized are outside the regime of the Act." *Hanna Mining Company* v. *Marine Engineers Benevolent Ass'n.*, 382 U.S. 181, 192–193. Since the Labor Board has no jurisdiction over the primary dispute, the Board's only concern is to provide neutral parties with the protection of Section 8(b)(4)(B). The Board need not have exclusive jurisdiction in order to do so. Neutral parties should therefore be free to take advantage of Section 8(b)(4)(B), or to seek injunctive relief in state court.

By the same token, so long as the secondary dispute implicates American employers and American employees, the Labor Board's exercise of concurrent jurisdiction would not undermine *Windward, supra.* Since the Board need only decide whether the secondary effects are prohibited by Section 8(b)(4)(B), concurrent jurisdiction would not "thrust the National Labor Relations Board into 'a delicate field of international relations.'" *International Longshoremen's, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 199. Moreover, the consequences of a Board decision that the secondary pressure violated Section 8(b)(4)(B) would not encroach upon any of the shipowners' prerogatives about which this Court was concerned in *Windward.* A Board decision that the secondary pressure did not violate Section 8(b)(4)(B) likewise would have no effect upon foreign shipowners, since the neutral employers or the shipowners would always be free to seek an injunction in state court.

The Department of State is concerned about the impact of a reversal here upon our relations with other countries. As evidenced by the *amicus* brief for the Government of Liberia, foreign governments are concerned that this Court's decision in *Windward, supra,* might be undermined in the present case. The National Labor Relations Board, on the other hand, is concerned that *Windward* might be extended in the present case to include an area traditionally within the jurisdiction of the Labor Board. We suggest that by providing the Labor Board and state courts with concurrent jurisdiction over the secondary aspects of primary disputes with foreign shipowners, both concerns may be vindicated.

## CONCLUSION

For these reasons, the court below correctly concluded that it was not preempted by the jurisdiction of the Labor Board from entertaining an injunction to end the picketing in this case.

Respectfully submitted.

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SEPTEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974